

COMMITMENT LAWS IN SOUTH DAKOTA AND THE NATION

Access to Mental Health Services Interim Committee

October 17, 2018

COMMITMENT CONSIDERATIONS

*Balancing individual liberty with public safety
and the responsibilities of the state*

- **Criteria and standards for inpatient commitment**
- **Duration**
- **Who can petition**
- **Due process rights**
- **Quality of commitment laws**
- **Usage of outpatient commitment**
 - **Provision for response to non-adherence**
 - **Not only compels patient but also compels system to provide treatment**

SOUTH DAKOTA CODIFIED LAWS

Addressing mental illness

SDCL SELECTED CRIMINAL PROCEDURE CHAPTERS

- [23A-10A](#) INQUIRY INTO DEFENDANT'S MENTAL COMPETENCY TO PROCEED
- [23A-26](#) VERDICTS
- [23A-27](#) SENTENCE AND JUDGMENT
- [23A-48](#) BAIL/RELEASE
- [23A-46](#) MENTAL EXAMINATIONS AND HEARINGS

23A-50 MENTAL HEALTH PROCEDURES IN CRIMINAL JUSTICE

- [23A-50-1](#) Definitions.
- [23A-50-2](#) Crisis services grant program.
- [23A-50-3](#) Report on mental health conditions of bond.
- [23A-50-4](#) Report on mental health court referrals and requirements.
- [23A-50-5](#) Fund for assisting counties with cost of court-ordered competency evaluations of defendants.
- [23A-50-6](#) Appointment of mental health response teams--Confidentiality of records.
- [23A-50-7](#) Establishment of mental health response team processes.
- [23A-50-8](#) Report regarding mental health response teams.
- [23A-50-9](#) Rules on team formation and procedures.
- [23A-50-10](#) Rules regarding procedures for court-appointed defense attorney training.
- [23A-50-11](#) List of services available through community mental health system.
- [23A-50-12](#) Oversight council established.
- [23A-50-13](#) Membership of oversight council.
- [23A-50-14](#) Meetings of oversight council--Powers and duties.

SDCL TITLE 27A - MENTALLY ILL PERSONS

- [27A-1](#) DEFINITIONS
- [27A-4](#) HUMAN SERVICES CENTER
- [27A-5](#) LOCAL MENTAL HEALTH CENTERS & COMMUNITY SUPPORT PROVIDERS
- [27A-7](#) COUNTY BOARDS OF MENTAL ILLNESS
- [27A-8](#) VOLUNTARY HOSPITALIZATION
- [27A-10](#) EMERGENCY COMMITMENT
- [27A-12](#) CARE / TREATMENT / RIGHTS
- [27A-13](#) COST OF CARE & TREATMENT IN STATE FACILITIES
- [27A-15](#) TREATMENT OF MINORS

ADDITIONAL SDCL CHAPTERS

- [24-11](#) JAILS
 - 24-11-55 to 24-11-60, inclusive – Pilot Program
- [26-7A](#) JUVENILE COURT
- [28-22](#) RATE-SETTING FOR COMMUNITY-BASED HEALTH AND HUMAN SERVICES

28-22-1. RATE-SETTING METHODOLOGY FOR SERVICES

The Department of Social Services and the Department of Human Services shall jointly establish a rate-setting methodology for services delivered by community-based health and human services providers. Each category of service shall undergo a comprehensive rate modeling analysis at least every five years. The departments may elect to conduct the analysis earlier or on a more frequent basis if warranted by cost report information or other market conditions. Any new service model shall undergo comprehensive rate modeling analysis prior to implementation.

Source: SL 2017, ch 122, § 1.

28-22-6 – RATES SETTING COVERS:

- (1) Nursing facilities;
- (2) Assisted living facilities;
- (3) In-home service providers;
- (4) Group care providers;
- (5) Psychiatric residential treatment facilities;
- (6) Substance abuse disorder treatment and prevention providers;
- (7) Community mental health centers;
- (8) Intermediate care facilities for co-occurring intellectual and developmental disabilities;
- (9) Community support providers; and
- (10) Other types of providers deemed appropriate for inclusion by either the secretary of the Department of Social Services or the secretary of the Department of Human Services.

SELECTED DEFINITIONS

SDCL 27A-1-1

SDCL 27A-1-1 - DEFINITIONS

(6) **"Danger to others,"** a reasonable expectation that the person will inflict serious physical injury upon another person in the near future, due to a severe mental illness, as evidenced by the person's treatment history and the person's recent acts or omissions which constitute a danger of serious physical injury for another individual. Such acts may include a recently expressed threat if the threat is such that, if considered in the light of its context or in light of the person's recent previous acts or omissions, it is substantially supportive of an expectation that the threat will be carried out;

SDCL 27A-1-1 - DEFINITIONS

(7) **"Danger to self,"**

(a) A reasonable expectation that the person will inflict serious physical injury upon himself or herself in the near future, due to a severe mental illness, as evidenced by the person's treatment history and the person's recent acts or omissions which constitute a danger of suicide or self-inflicted serious physical injury. Such acts may include a recently expressed threat if the threat is such that, if considered in the light of its context or in light of the person's recent previous acts or omissions, it is substantially supportive of an expectation that the threat will be carried out; or

(b) A reasonable expectation of danger of serious personal harm in the near future, due to a severe mental illness, as evidenced by the person's treatment history and the person's recent acts or omissions which demonstrate an inability to provide for some basic human needs such as food, clothing, shelter, essential medical care, or personal safety, or by arrests for criminal behavior which occur as a result of the worsening of the person's severe mental illness;

SDCL 27A-1-1 - DEFINITIONS

(18) **"Outpatient commitment order,"** an order by the board committing a person to outpatient treatment, either following a commitment hearing or upon a stipulation of the parties represented by counsel;

(19) **"Outpatient treatment,"** mental health diagnosis, observation, evaluation, care, treatment or rehabilitation rendered inside or outside the premises of an outpatient program for the treatment of persons with mental, emotional, or substance use disorders;

SDCL 27A-1-1 - DEFINITIONS

(14) **"Inpatient treatment,"** mental health diagnosis, observation, evaluation, care, treatment, or rehabilitation rendered inside or on the premises of an inpatient psychiatric facility when the individual resides on the premises;

SDCL 27A-1-1 - DEFINITIONS

(12) **"Informed consent,"** consent voluntarily, knowingly, and competently given without any element of force, fraud, deceit, duress, threat, or other form of coercion after conscientious explanation of all information that a reasonable person would consider significant to the decision in a manner reasonably comprehensible to general lay understanding;

SDCL 27A-1-1 - Definitions

(26) **"Treatment order,"** an order by the board of mental illness, as part of an inpatient or outpatient commitment order, or as a separate order by the circuit court or board after an inpatient or outpatient commitment ordered by the board, that requires a program of treatment as specified in this title.

SDCL 27A-1-1 - Definitions

(15) **"Least restrictive treatment alternative,"** the treatment and conditions of treatment which, separately and in combination, are no more intrusive or restrictive of mental, social, or physical freedom than necessary to achieve a reasonably adequate therapeutic benefit. In determining the least restrictive alternative, considerations shall include the values and preferences of the patient, the environmental restrictiveness of treatment settings, the duration of treatment, the physical safety of the patient and others, the psychological and physical restrictiveness of treatments, the relative risks and benefits of treatments to the patient, the proximity of the treatment program to the patient's residence, and the availability of family and community resources and support;

SDCL 27A-1-1 - DEFINITIONS

(4) **"Chronic disability,"** a condition evidenced by a reasonable expectation, based on the person's psychiatric history, that the person is incapable of making an informed medical decision because of a severe mental illness, is unlikely to comply with treatment as shown by a failure to comply with a prescribed course of treatment outside of an inpatient setting on two or more occasions within any continuous twelve month period, and, as a consequence, the person's current condition is likely to deteriorate until it is probable that the person will be a danger to self or others;

SDCL 27A-1-1 - DEFINITIONS

(24) **"Severe mental illness,"** substantial organic or psychiatric disorder of thought, mood, perception, orientation, or memory which significantly impairs judgment, behavior, or ability to cope with the basic demands of life. Intellectual disability, epilepsy, other developmental disability, alcohol or substance abuse, or brief periods of intoxication, or criminal behavior do not, alone, constitute severe mental illness;

DEMENTIA & COMMITMENT

- Many states view that dementia alone is not sufficient grounds for civil commitment
- 2012 Wisconsin Supreme Court Case
 - [*In re Helen E.F.*](#), 2012 WI 50
 - Incurable and untreatable, so maintenance not commitment treatment
 - Relied on Wisconsin statutes and case law
- Issues:
 - Unable to care for one's self
 - Unable to provide informed consent
 - Unable to rehabilitate
 - Return to least restrictive means, intent of commitment

Competency Evaluation
vs.
Competency Restoration

23A-10A-3. HEARING ON MENTAL CONDITION-- MENTAL EXAMINATION AND REPORT.

At any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, the defendant or the prosecuting attorney may file a motion for a **hearing to determine the mental competency of the defendant**. The court shall grant the motion, or shall order such a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or developmental disability, or other conditions set forth in § 23A-10A-1, rendering the defendant mentally incompetent to the extent that the defendant is unable to understand the nature and consequences of the proceeding against the defendant or to assist properly in the defendant's defense. **Prior to the date of hearing, the court may order that a psychiatric or psychological examination of the defendant** be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of §§ 23A-46-1 and 23A-46-2. The examination shall be completed within twenty-one days of the court order, unless for good cause the court grants a continuance. The hearing shall be conducted pursuant to the provisions of § 23A-46-3.

Source: SL 1978, ch 175, § 4; SDCL Supp, § 23-38-2.1; SL 1985, ch 192, § 38; SL 1991, ch 199, § 4; SL 2017, ch 109, § 16.

23A-10A-1. DEFINITION OF MENTAL INCOMPETENCY

The term, "mentally incompetent to proceed," as used in this chapter, means the condition of a person who is suffering from a mental disease, developmental disability, as defined in § 27B-1-18, or psychological, physiological, or etiological condition rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.

Source: SL 1978, ch 175, § 2; SDCL Supp, § 23-38-1.1; SL 1985, ch 192, § 47; SL 1991, ch 199, § 1.

23A-46-2. REPORT BY EXAMINER--CONTENTS.

A psychiatric or psychological report ordered pursuant to this chapter, §§ 23A-10A-3 to 23A-10A-4.2, inclusive; 23A-26-12 to 23A-26-12.6, inclusive; or 23A-27-42 to 23A-27-46, inclusive, shall be prepared by the examiner designated to conduct the psychiatric or psychological examination, shall be filed with the court with copies provided to the counsel for the person examined and to the prosecuting attorney and shall include:

- (1) The person's history, if applicable, and present symptoms;
- (2) A description of the psychiatric, psychological, and medical tests that were employed and their results;
- (3) The examiner's findings; and
- (4) The examiner's opinions as to diagnosis, prognosis and:
 - (a) If the examination is ordered under § 23A-10A-3, whether the person is suffering from a mental disease or defect rendering the person mentally incompetent to the extent that the person is unable to understand the nature and consequences of the proceedings against the person or to assist properly in the person's defense;
 - (b) If the examination is ordered under § 23A-10-4, whether the person was insane at the time of the offense charged;
 - (c) If the examination is ordered under § 23A-46-9, whether the person is suffering from a mental disease or defect as a result of which the person's release would create a substantial risk of bodily injury to another person or serious damage to property of another;
 - (d) If the examination is ordered under § 23A-26-12.1 or 23A-27-43, whether the person is suffering from a mental disease or defect as a result of which the person is in need of custody for care or treatment in a suitable facility; and
 - (e) If the examination is ordered as a part of a presentence investigation, any recommendation the examiner may have as to how the mental condition of the defendant should affect the sentence.

23A-10A-4. COMMITMENT--FINDING REQUIRED--DURATION.

If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or developmental disability, or other conditions set forth in § 23A-10A-1, rendering him mentally incompetent to the extent that he is **unable to understand the nature and consequences of the proceedings** against him or to assist properly in his defense, the **court shall commit the defendant to the custody of an approved facility** having residential capability. The facility shall have custody and treat the defendant for such a **reasonable period of time**, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the trial to proceed. No commitment may be made to an approved facility which is not owned by the state without first obtaining the consent of the administrator of the privately owned facility.

Source: SDC 1939 & Supp 1960, § 34.2002; SDCL, § 23-38-2; SL 1978, ch 175, § 3; SL 1985, ch 192, § 39; SL 1991, ch 199, § 5.

Competency Restoration

“Process used when an individual charged with a crime is found by a court to be incompetent to stand trial, typically due to an active mental illness or an intellectual disability. A criminal defendant must be restored to competency before the legal process can continue. To be considered restored and competent to stand trial, a defendant must be able to consult with his or her defense lawyer and have a rational and factual understanding of the legal proceedings.”

- Source: Policy Brief: Competency Restoration, Hogg Foundation for Mental Health, undated, last accessed October 2018 at: <http://hogg.utexas.edu/project/competency-restoration-policy-brief>.

VERMONT

- Most states rely on mental health court process, as in Vermont
- [Flow Chart Process Handout](#) (provided)
- [2017 Vermont House Committee on Health Care presentation](#)

NEBRASKA

- Another State utilizing Boards instead of solely Courts for the civil commitment process
- Aligns judicial districts with behavioral health regions
- Judges appoint 1-3 mental health boards in each region
- Nebraska Mental Health Commitment Act Reference Manual 2011
 - http://dhhs.ne.gov/behavioral_health/Documents/NE_MentalHealthCommitmentActReferenceManual2011.pdf

SOUTH DAKOTA PUBLICATIONS

- [A Roadmap of South Dakota's Revised Mental Health Code: The Involuntary Commitment and Voluntary Hospitalization of Adults, 2011](#)
 - <https://dss.sd.gov/docs/behavioralhealth/community/roadmapofsouthdakota2000.pdf>
- [Representing a Client with Mental Illness, A South Dakota Defense Attorney's Guide, May 8, 2018](#)
 - http://ujs.sd.gov/uploads/docs/Mental_Illness_handbook.pdf

Questions?